Dato' Vijay Kumar Natarajan v Choy Kok Mun

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–843 OF 1999
MOHD HISHAMUDIN J
15 MAY 2009

Civil Procedure — Pleadings — Statement of claim — Defective — Omission to plead essential particulars — Claim for breach of confidence — Whether omission could be rectified by adducing evidence

Tort — Breach of confidence — Disclosure of confidential information by banker — Whether tortious act — Whether information was of confidential nature — Type of information which will be considered as confidential — Whether breach of confidence proven

The plaintiff had borrowed from UOL Credit Sdn Bhd ('UOL') in a share financing facility in order to help his friend one Dato' Peh. Dato' Peh later defaulted in repaying the facility as a result of which UOL commenced legal action against the plaintiff. Subsequently the plaintiff offered to settle part of the facility and a meeting was held at the plaintiff's office between the plaintiff and the defendant ('general manager of UOL') to discuss the terms of the settlement. The defendant brought along a draft settlement agreement prepared by UOL's solicitors, Skrine & Co ('Skrine') to be entered into between Dato' Peh and UOL. At the meeting, the plaintiff made amendments to the Skrine's draft and handwrote a draft settlement agreement. The defendant agreed to the plaintiff's request to keep the matter confidential ie the fact that the plaintiff had made amendments to the Skrine's draft and produced the handwritten draft. Subsequently a dispute arose between the plaintiff and UOL concerning the effect and ambit of the proposed settlement and the plaintiff commenced legal action. In defending UOL in the said legal action, the defendant affirmed several affidavits. In one of the affidavits, the defendant disclosed the aforesaid matters which he had agreed to keep confidential. Hence, the present suit by the plaintiff against the defendant for breach of confidence.

Held, dismissing the claim with costs:

(1) There was nothing confidential about the information that passed

between the plaintiff and the defendant. Although the defendant had agreed that the information be kept confidential, that agreement, by itself, did not confer on the information a quality that qualified it to be 'confidential' for the purpose of the tortious liability at hand (see para 22).

(2) The plaintiff's cause of action was based purely on tortious liability — the tort of breach of confidence. The tort of breach of confidence requires more than merely an agreement by the recipient of an information that the information should be kept confidential. The information must be of a nature that the courts, through judicial precedents, have recognised its confidentiality and have accorded it judicial protection (see paras 23 & 25).

(3) To evaluate the quality of the information sought to be protected, the court would have to consider, among others, the reason as to why the person communicating the information wants the person to whom the information is communicated to keep the information confidential. The court must evaluate the reason applying the objective test: the reason given by the plaintiff must be one that is acceptable to the court looking at the whole circumstances of the case objectively. The plaintiff's expectation for the information to be kept confidential must be reasonable or rational (see paras 26–27).

(4) The statement of claim was fatally defective in that it omitted certain essential particulars (which could not be rectified by adducing evidence), namely: (i) particulars pertaining to the necessity to maintain confidentiality over the information; (ii) particulars pertaining to the relationship of the parties; and (iii) particulars pertaining to the necessity for the plaintiff to amend Skrine's draft and to produce his own draft (see para 42).

(5) Considering the evidence, the information in question did not have the necessary quality of confidence about it. The transaction was personal in nature. Looking at the transaction and the disclosure, there was no invasion of privacy involved. Where the transaction is personal in nature, the court will only grant protection or remedy where there is an invasion of privacy. Moreover, the plaintiff failed to convince the court that he had a good reason for wanting the information to be kept confidential (see para 43).

[Bahasa Malaysia summary

Plaintif meminjam daripada UOL Credit Sdn Bhd ('UOL') dalam satu kemudahan pembiayaan perkongsian bagi menolong kawannya Dato' Peh. Dato' Peh kemudiannya mungkir membayar semula kemudahan tersebut dan

mengakibatkan UOL memulakan tindakan undang-undang terhadap plaintif. Kemudiannya plaintif menawarkan untuk membayar sebahagian kemudahan dan mesyuarat diadakan di pejabat plaintif di antara plaintif dan defendan ('pengurus besar UOL') bagi membincangkan terma-terma pembayaran. Defendan membawa bersama draf perjanjian pembayaran yang disediakan oleh peguam cara-peguam cara UOL, Skrine & Co ('Skrine') untuk dimeterai di antara Dato' Peh dan UOL. Dalam mesyuarat tersebut, plaintif membuat beberapa pindaan pada draf Skrine dan menulis sendiri draf perjanjian pembayaran. Defendan bersetuju dengan permintaan plaintif untuk memastikan perkara tersebut dirahsiakan iaitu, fakta bahawa plaintif membuat beberapa pindaan kepada draf Skrine dan mengemukakan draf bertulis tangan. Kemudiannya pertikaian timbul di antara plaintif dan UOL mengenai kesan dan lingkungan pembayaran yang dicadangkan dan plaintif memulakan tindakan undang-undang. Sebagai membela UOL dalam tindakan undang-undang tersebut, defendan membenarkan beberapa afidavit. Dalam satu daripada afidavit-afidavit tersebut, defendan mendedahkan perkara-perkara di mana dia telah bersetuju untuk merahsiakannya. Oleh itu, guaman ini oleh plaintif terhadap defendan kerana pecah kepercayaan.

Diputuskan, menolak tuntutan dengan kos:

(1) Tidak terdapat apa-apa yang rahsia mengenai maklumat di antara plaintif dan defendan. Walaupun defendan bersetuju bahawa maklumat tersebut dirahsiakan, perjanjian tersebut, dengan sendirinya, tidak memberikan kualiti kepada maklumat tersebut yang melayakkannya untuk menjadi 'confidential' bagi tujuan liabiliti tort ketika ini (lihat perenggan 22).

(2) Kausa tindakan plaintif adalah berdasarkan liabiliti tort semata-mata — tort pecah kepercayaan. Tort pecah kepercayaan memerlukan lebih daripada perjanjian oleh penerima maklumat bahawa maklumat tersebut harus dirahsiakan. Maklumat tersebut mestilah bersifat di mana mahkamah melalui duluan kehakiman boleh mengenalpasti kerahsiaannya dan memberikannya perlindungan kehakiman (lihat perenggan 23 & 25).

(3) Bagi menghuraikan kualiti maklumat yang dipohon untuk dilindungi, mahkamah perlu mempertimbangkan, antara lain, alasan-alasan kenapa orang yang mengemukakan maklumat tersebut mahu orang yang mendengar maklumat tersebut merahsiakannya. Mahkamah perlu menghuraikan alasan menggunakan ujian objektif: alasan yang diberikan oleh plaintif mestilah boleh diterimapakai kepada mahkamah

bagi melihat keseluruhan keadaan kes secara objektif. Jangkaan plaintif agar maklumat tersebut dirahsiakan mestilah munasabah dan rasional (lihat perenggan 26–27).

(4) Pernyataan tuntutan tersebut cacat kerana ia tidak memasukkan beberapa butiran penting (yang tidak boleh diperbetulkan dengan mengemukakan keterangan), iaitu: (i) butiran-butiran mengenai kepentingan untuk memastikan kerahsiaan maklumat; (ii) butiran-butiran mengenai hubungan pihak-pihak; dan (iii) butiran-butiran mengenai keperluan plaintif untuk meminda draf Skrine dan mengemukakan drafnya sendiri (lihat perenggan 42).

(5) Mempertimbangkan keterangan tersebut, maklumat berkenaan tidak mempunyai kualiti kerahsiaan yang diperlukan. Transaksi tersebut adalah bersifat peribadi. Berdasarkan transaksi dan pendedahan tersebut, tidak terdapat pencerobohan peribadi yang berlaku. Di mana transaksi tersebut bersifat peribadi, mahkamah hanya akan memberikan perlindungan atau remedi sekiranya terdapat pencerobohan peribadi. Lebih-lebih lagi, plaintif gagal meyakinkan mahkamah bahawa dia mempunyai alasan yang baik untuk memastikan maklumat tersebut dirahsiakan (lihat perenggan 43).]

Notes

For cases on breach of confidence generally, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 17–21.

For cases on statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5522–5557.

Cases referred to

A-G v Guardian Newspapers (No 2)(HL(E)) [1990] 1 AC 109, HL (refd)
Coco v AN Clark (Engineers) Ltd [1969] RPC 41, HC (refd)
Duchess of Argyll v Duke of Argyll [1967] Ch 302 (refd)
Prince Albert v Strange (1849) 2 De D & SM 652 (refd)

SC Chan (Kumar Jaspal Quah & Aishah) for the plaintiff.
Nallini Pathmanathan (K Anantham and Mahaletchumi Balakrishna with her) (Skrine & Co) for the defendant.

Mohd Hishamudin J:

[1] In the present case the plaintiff's cause of action against the defendant is based on the tort of breach of confidence.

[2] Perhaps it is best to begin by quoting *Clerk and Lindsell on Tort*:

> *General principles*. A duty of confidence arises when confidential information comes to the knowledge of a person (a confidant), in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others (*Clerk and Lindsell on Tort* (17th Ed) at p 1417, para 26–01).

[3] A further statement of the principles can also be found in the words of Ungoed-Thomas J in *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 at p 304:

> A contract or obligation of confidence need not be expressed, but could be implied, and a breach of contract or trust or faith could arise independently of any right of property or contract (other than any contract which the imparting of the confidence might itself create); and that the court, in the exercise of its equitable jurisdiction, would restrain a breach of confidence independently of any right at law...

[4] The law of confidence is based upon a broad equitable obligation of conscience. Indeed, the action for breach of confidence is originally an equitable remedy. The most famous early instance of its application is in the well-known case of *Prince Albert v Strange* (1849) 2 De D & SM 652 wherein an injunction was granted to prohibit the publication of a catalogue describing the etchings made by the Prince and Queen Victoria. The catalogue was based on information obtained by one JT Judge from a person named Middleton. Middleton was employed by Brown who had a contract to print some of the etchings from the private employment of the royal family. In breach of confidence, Middleton, who was not a party to the cause, sold copies of the etchings to Judge. Judge was enjoined from using information which he must be taken to have known was sold to him in breach of confidence or breach of trust.

[5] In *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, Megarry J identified the three essentials to establish the duty of confidence (at p 47):

> Three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene MR in *Saltman*'s case ((1948) 65 RPC 203 at p 215) must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

[6] The above statement of the principle was approved by Lord Griffiths in his judgment in the House of Lords case of *A-G v Guardian Newspapers (No 2) (HL(E))* [1990] 1 AC 109.

[7] In the present case, I have dismissed the plaintiff's claim with costs. I shall now give my grounds.

[8] I shall begin by stating the facts of the case. The plaintiff is an advocate and solicitor and is a partner in a legal firm known as Messrs Kumar Jaspal Quah & Aishah. He was a borrower in a share financing facility granted by a financial institution known as UOL Credit Sdn Bhd ('UOL'). The defendant was at the material time a general manager of UOL and was in charge of the share financing division of UOL. Now, what happened was that one Dato' Peh Teck Quee ('Dato' Peh'), a close friend of the plaintiff, was desirous of obtaining a RM16m loan from UOL. The purpose of the loan was to preserve Dato' Peh's controlling interest in a public listed company known as Mercury Industries Bhd, of which he was the chairman. In order to obtain a speedy approval of the loan, Dato' Peh did not apply the whole RM16m loan wholly in his own name; for that would require the seeking of the approval of the board of directors of UOL, which would take time; whereas he needed the loan urgently. So he sought the help of the plaintiff (who was his close friend), the plaintiff's legal partner (of his firm), namely, one Mr Stephen Quah, and one Ms Teh Li Li, (Dato' Peh's personal assistant); who all agreed to be three other separate borrowers (besides himself); whereby the total of the four borrowings would amount to RM16m. Dato' Peh was the guarantor for the facility agreements entered into by the plaintiff, Stephen Quah ('Quah') and Teh Li Li. As an additional security in respect of the plaintiff's facility, the plaintiff pledged to UOL his shares in Mercury Industries Bhd. The defendant and other relevant senior officers of UOL (including another general manager by the name of Mok Siew Wah – PW2) were aware of the whole scheme (ie the purpose of the four facilities and the role of Dato' Peh as the 'real' borrower). There was no suggestion by either party that the scheme was improper, fraudulent or unlawful.

[9] Then there was the Asian financial crisis of 1997. The Kuala Lumpur stock market, like all other Asian bourses, crashed. Mercury Industries Bhd was not spared the onslaught, dropping from over RM20 per share to a mere few cents. In other words, the four facilities experienced a shortfall in the share price from the agreed margin. UOL took measures to recover the amounts from the plaintiff, Quah, Teh Li Li and Dato' Peh: margin calls were made. By this time the total amount owing to UOL by the plaintiff together with Quah was RM8m.

[10] All attempts to recover the outstanding amounts under all four facilities were unsuccessful. As a result, UOL commenced legal proceedings against the plaintiff, Dato' Peh, Quah and Teh Li Li. The four suits were filed at the Kuala Lumpur High Court in May 1998.

[11] By this time the plaintiff's relationship with Dato' Peh had soured. The plaintiff and Quah were pressuring Dato' Peh to settle the debts with UOL, since the latter was the real borrower.

[12] Subsequently both the plaintiff and Dato' Peh offered to settle the debts with UOL — but each in his own separate way.

[13] Dato' Peh offered to settle the whole debts, that is to say, his debt and the debts of the other three borrowers. UOL accepted Dato' Peh's proposal that he would settle the total outstanding amount under the four facilities by monthly installments spanning a period of three years, with an initial installment of RM2m, in return for which UOL would discontinue the suits against the plaintiff, Quah and Teh Li Li. However, Dato' Peh told the defendant and his colleague Mok Siew Wah ('Mok') (when the defendant and Mok went to see him to inquire about the possibility of settlement) that the RM2m upfront payment would be made by the plaintiff and not by him.

[14] So, on 22 December 1998 both the defendant and Mok went to see the plaintiff to inform the latter of the terms of settlement that was agreed into between Dato' Peh and UOL and that the RM2m upfront should be paid by the plaintiff.

[15] Now, the plaintiff agreed to make the RM2m payment but subject to three conditions. Firstly, this payment of RM2m was to be regarded by UOL as a settlement of his and Quah's debts with UOL. Secondly, UOL must accept that this settlement was not linked with whatever settlement that Dato' Peh made with UOL. Thirdly, upon the RM2m being made by the plaintiff to UOL, the latter was to withdraw the suit against the plaintiff and Quah. The plaintiff's proposal was referred by the defendant and Mok to UOL's higher management who accepted the proposed payment of RM2m together with the conditions.

[16] The following day, 23 December 1998, the defendant and Mok went again to meet the plaintiff at the latter's office to inform the latter of UOL's acceptance of his proposed settlement. This time they went bringing with them a draft settlement agreement prepared by UOL's solicitors, Skrine & Co to be entered into between Dato' Peh and UOL. According to the defendant, what transpired then in the plaintiff's office was as follows:

Q 53: *What transpired between Vijay, Mok and you in the meeting on the draft settlement agreement?*

A: We met up with Vijay and I showed him a copy of Skrine's draft of the settlement agreement and his initial response was to ask why we had bothered to also draft a settlement agreement. He then produced his handwritten draft of a settlement agreement from his bag.

I recall that he then also proceeded to amend Skrine's draft by penciling in some deletions and amendments. The amendments included removing any mention of him and Quah from the settlement agreement and removing a further obligation on Dato' Peh to indemnify UOL Credit under the settlement agreement. Vijay then passed us the copy of Skrine's draft settlement agreement that he had amended and his handwritten draft settlement agreement.

[17] According to Mok, before he and the defendant left the plaintiff's office the plaintiff informed both him and Choy (the defendant) that whatever transpired in his office between him and both the defendant and Mok should be 'off the record' to which both of them agreed.

[18] I am making a finding of fact here that both the defendant and Mok understood what those words meant: that whatever transpired between the plaintiff and the defendant (and Mok) ought to be kept confidential, particularly, the fact that it was the plaintiff who had made the amendments to the Skrine's draft and that the plaintiff was the author of the handwritten draft settlement agreement; and both had agreed to the plaintiff's request to keep the matter confidential. That the plaintiff's main concern was to ensure that his role in proposing amendments to the Skrine draft and in producing the handwritten draft is not disclosed to any third party is evident by what he said in cross-examination:

Q: *What precisely is the information which you say is confidential and needs to be protected from disclosure?*

A: The fact that I assisted him in the drafting of a draft compromise agreement and the physical draft itself; and the fact that I vetted the Skrine draft.

Q: *It is your identity primarily that you wanted kept confidential?*

A: Yes.

[19] Now, as far as the plaintiff was concerned, he thought that his RM2m payment and UOL's acceptance of his conditions was the end of the matter as far as his debt with UOL was concerned. However, that was not to be; for on 15 March 1999 (that is, three months later) UOL wrote to the plaintiff stating that they had closed his account and were transferring 562 lots of shares in Mercury Industries Bhd placed as security therein to a new account opened under the name of Dato' Peh. The plaintiff was upset by this letter;

he protested to UOL. But UOL maintained their position that they were entitled to hold on to the shares despite the matter being fully settled. It would appear now that each side had a different interpretation of the ambit of the 'settlement'.

[20] The plaintiff responded by filing a suit against UOL vide Kuala Lumpur High Court Originating Summons D8–24–61 of 2000 wherein he sought various declarations, inter alia, that the settlement in December 1998 between the plaintiff and UOL was a full and final settlement containing all terms; that the plaintiff's payment of RM2m which was accepted was a full and final settlement of UOL's claim against him; and that UOL was after that settlement wrongly withholding the plaintiff's shares.

[21] UOL in its defence against the plaintiff's originating summons caused the defendant (Choy) to affirm several affidavits. It was the primary contention of UOL that the settlement between the plaintiff and UOL and that between UOL and Dato' Peh were linked and part of a global settlement and that the plaintiff's settlement could not be read independently. UOL maintained that the plaintiff's payment was also for Peh and Teh Li Li. In the originating summons, the defendant affirmed an affidavit on behalf of UOL disclosing that the plaintiff had participated and had assisted in some manner in preparing a draft agreement for the settlement between UOL and Peh in his own handwriting. And prior to affirming this affidavit, the defendant had disclosed to UOL's solicitors of the fact that the plaintiff was the author of the handwritten draft. To the plaintiff, this disclosure was a breach of confidence. Hence, the present suit by the plaintiff against the defendant.

[22] Now, reverting to the main issue before me, in my judgment, there is nothing confidential about the information (by 'information' here I mean what had transpired between the plaintiff and the defendant (and Mok) at the plaintiff's office on 23 December 1998 and the role of the plaintiff in amending the Skrine draft settlement agreement and producing a handwritten draft of his own) that passed between the plaintiff and the defendant. It is, however, true that the defendant (together with Mok) had agreed that the information be kept confidential. But this agreement, by itself, does not confer on the information a quality that qualifies it to be 'confidential' for the purpose of the tortious liability at hand.

[23] At this juncture, before I proceed further, two matters, however, must be put at rest. First, in the present case it must be borne in mind that, notwithstanding that there was a confidentiality agreement between the parties, and that the plaintiff alleges that the defendant had breached the agreement, the plaintiff's claim, however — and this is not in dispute — is not a claim for a breach of contract. Indeed, there is no allegation at all on

the part of the plaintiff that the agreement was contractual in nature; or that the defendant was contractually bound not to divulge the information to a third party. The plaintiff's cause of action is based purely on tortious liability — the tort of breach of confidence.

[24] Second, in the present case I propose not to make any determination on the issue (notwithstanding the fact that the trial became somewhat protracted over this issue) as to what was the true intention of the parties when the plaintiff made the payment of RM2m to UOL: whether or not the plaintiff by making the payment was supposed to be freed completely of any liability towards UOL; as well as on the issue as to whether the plaintiff's settlement with UOL was independent or linked with Dato' Peh's settlement with the same.

[25] Now, the tort of breach of confidence requires more than merely an agreement by the recipient of an information that the information should be kept confidential. The law looks at the nature of the information itself. The law does not protect just any information: the information must be of a nature that the courts, through judicial precedents, have always recognised its confidentiality and has accorded it judicial protection; for example, trade secrets; or information of sexual relationship between spouses; or information between a professional (a doctor, for instance) and his client. In *Clerk and Lindsell on Torts* ((17th Ed) at p 1422, para 26–10) the learned author states:

> The disclosure of information will only be restrained if it has the necessary quality of confidence about it.

[26] In order for the court to make an evaluation on the quality of the information sought to be protected, the court would have to consider, among others, the reason as to why the person communicating the information (that is to say, the plaintiff) wants the person to whom the information is communicated (that is to say, the defendant) to keep the information confidential. In this regard, in the present case, my observation is that — and I think that this is highly pertinent — the statement of claim is silent as to the reason why the plaintiff wanted the information to be kept confidential. Paragraph 3 of the statement of claim merely states:

> 3. On or about December 1998 the defendant together with one Mok Siew Wah approached the plaintiff for advice and if necessary make amendments to a draft settlement to be executed between UOL and one Dato' Peh Teck Quee (hereinafter referred to as 'the settlement agreement'). Advice on the settlement agreement was rendered together with amendment to the settlement agreement was given by the plaintiff to the defendant and Mr Mok Siew Wah.

A **[27]** The plaintiff must plead the reason why he wanted the information to be kept confidential. But even if the reason is pleaded, it cannot be just any reason. The court must evaluate the reason applying the objective test: the reason given by the plaintiff must be one that is acceptable to the court looking at the whole circumstances of the case objectively. And an important B factor to consider is that the plaintiff's expectation for the information to be kept confidential must be reasonable or rational. It cannot be at the whims and fancy of the plaintiff. What is reasonable or rational to the plaintiff may not necessarily be so to the court. In judicially established categories, however, the rationale is easily ascertained and appreciated by the court; for C example, in cases involving trade secrets; or in cases involving intimate relationship between spouses; or in cases involving a professional and his client; or in cases involving literary ideas. In such cases, the rationale for maintaining confidentiality is so obvious that it need not have to be explicitly stated in the statement of claim. In grey areas (such as the present case), D however, the reason for wanting confidentiality must be clearly explained in the pleading; and the court then, having considered the pleading and the evidence, would have to make a value judgment on the plaintiff's rationale, including a balancing of the competing interests and, ultimately, would have to make a policy decision.

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[28] But in the present case, however, I find that the problem with the plaintiff's case is more serious than just being a case of where the plaintiff has failed to state in the statement of claim the reason as to why he wanted the information to be kept confidential by the defendant. There is this further F observation — and I think, a pertinent one — that I make on the pleadings that the statement of claim does not describe the relationship between the defendant and the plaintiff. Is it a relationship between an employer and employee (obviously in the present case it is not)? Is it a relationship between spouses (obviously in the present case it is not)? Is it a relationship between G a professional (for example, a banker or lawyer or doctor) and his client? Or is it merely a relationship merely between friends (although not pleaded, it is the plaintiff's evidence that initially the defendant and Mok came to his office as officers of UOL but the communication of the information was made on a 'friend to friend' basis)?

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[29] On this issue as to the relationship between the parties at the time of the communication of the information, the plaintiff in his evidence, however, states that the information was communicated by the plaintiff to the defendant in their capacity as 'a friend to a friend' and as 'brothers' and not

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as between an officer of a defendant/lender company and a borrower (the plaintiff). In my judgment, if this is so, then it must be so declared in the statement of claim itself (for whatever it is worth): this fact cannot be disclosed only in the evidence.

[30] The other material omission is that the statement of claim does not explain as to why the plaintiff felt it was necessary for him to make amendments to the draft settlement agreement as drafted by Messrs Skrine & Co, and to further come up with a handwritten draft of his own. Was it merely because of the persuasion by the defendant and Mok? Or, was there something more than mere persuasion, that is to say, there was something at stake, something in the Skrine draft that affected his interest? I do note, however, that the plaintiff does explain in his evidence as to why he made the amendments to the Skrine draft settlement agreement and as to why he came up with a handwritten draft settlement of his own. When he made the amendments and the drafting, it was not just a matter of persuasion by the defendant and Mok; he wanted to drive home the point that his settlement with UOL as regards the loans with UOL is not in any way linked with Dato' Peh's settlement with UOL with regard to the same. But this explanation, likewise, should have been pleaded.

[31] In my judgment, by reason of the lack of material particulars in the statement of claim, this renders the statement of claim bad in law, and hence even on this ground itself the plaintiff's claim ought to be dismissed. The plaintiff has failed to state as to why he found it necessary to draft the proposed settlement agreement that had the effect of amending the draft proposed settlement agreement (between Dato' Peh and UOL) as drafted by Skrine & Co. The plaintiff has omitted to state in the statement of claim in what capacity did he give the information to the defendant; and in what capacity did the defendant receive the information. And the plaintiff has omitted to state in the statement of claim as to why he had insisted on the confidentiality of the information. By reason of this lack of material particulars, the statement of claim has failed to disclose any cause of action. In *Clerk and Lindsell on Torts* (at p 1422, para 26–10) it is said:

> Although relief has been given where the nature of the allegedly confidential information has not been specified, it must generally be ascertained and particularised.

[32] It is an elementary rule of civil procedure that where a material fact is not pleaded in the statement of claim (or statement of defence) such an omission cannot be rectified by way of adducing evidence.

[33] Be that as it may, the plaintiff, in his evidence, did give three reasons as to why he wanted the information to be kept confidential. He said:

Q20: Look at page 8, ABD (N). Can you tell this Court what is this document?

A: This is a draft Compromise and Settlement Agreement between Dato' Peh and UOL Credit Sdn Bhd in my handwriting.

Q21: Can you tell us how this document came about?

A: Some time before 23/12/1998 Mr. Mok and Mr. Choy as was very common during this period, came to my office and sat in my room to discuss our settlement. They told me that they were also settling the matter with Dato' Peh. Mr. Choy showed me a draft settlement agreement, which he said was drafted by Messrs Skrine & Co.

I categorically replied that I did not want to know anything about their settlement with Dato' Peh. Mr. Choy pleaded with me and said that we were close friends and his job was on the line because of this and other matters wherein his department had lost millions of ringgits. He said he had known me for so long and trusted my capabilities and ability as a lawyer. As far as he was concerned, Miss Nallini was a young lawyer and he had no confidence in her work, as he had never dealt with her before. He just wanted me to look at the document she had prepared.

Q22: What happened next?

A: Mr. Choy pushed a document at me despite my protest. I told him that it might give rise to problems of etiquette if I involved myself with a document prepared by another advocate and solicitor.

Mr. Choy then said he was approaching me not as an advocate and solicitor but as a 'friend to a friend' and on a personal basis. I said words to the effect that even if I were to consider looking at the document, I would only do so because he is my friend and we were 'brothers' but it must remain within my four walls and off the record. He assured me that whatever I did would remain within the four walls and off the record. He kept pestering me to just look at the document and the meeting would be confidential. We went into a long and protracted exchange on this whereby I maintained again and again that I did not wish to get involved in this matter as the same relates to the settlement between Dato' Peh and them, which I did not want to be privy to. Finally I gave in and looked at the document but made it very clear that I was in no way to be connected with Dato' Peh's settlement and my helping them was purely as a friend and the fact I was helping to redraft the agreement would remain totally confidential. Both Mr. Choy and Mr. Mok agreed.

Q23: Look at page 5, ABD (N). Is this the draft prepared by M/s Skrine & Co. that was shown to you?

A: I cannot be certain as I never kept a copy or opened a file. I assisted Mr. Choy spontaneously and never kept anything, never expecting him to breach his undertaking to keep the matter confidential.

Q24: Nonetheless can you say anything about the document?

A: Yes. Looking at the document I felt that it might provide an avenue for Dato' Peh to escape liability subsequently. However more important I noted that the amount stated to be paid there was about RM17,000,000.00 and not RM19,000,000.00. This was a point I noted in the draft Mr. Choy showed to me. I told them that was not proper. The RM2,000,000.00 was being paid by me, why should Dato' Peh benefit from it. He should be asked to pay the full RM19,000,000.00 and if UOL Credit Sdn Bhd recovered the full amount, they could return the RM2,000,000.00 to me. After all my settlement of RM2,000,000.00 had nothing to do with his settlement and hence it should not be reflected in his agreement. Of course at that point in time I was unaware of the real agreement entered into between UOL and Dato' Peh until I sighted the minutes of the meeting between UOL Credit Sdn Bhd and Dato' Peh held on 11/12/1999, filed in this proceeding.

Q25: What happened next?

A: Mr. Choy said that if that was the case, he asked me to physically re-draft the settlement rather than just commenting on the draft agreement by M/s Skrine & Co. Again I said 'No'. I said just tell M/s Skrine & Co. the points I had indicated and they could attend to it. Again Mr. Choy pleaded with me and said he knew I could do it in 5 minutes whereas M/s Skrine & Co. would take days to come back to him. I said again I did not want to be seen to be involved in Dato' Peh's settlement and I did not want to appear to disrespect another lawyer's work. As far as I was concerned, M/s Skrine & Co. is a reputable firm and they have reputable and capable lawyers.

Q26: What happened then?

A: Mr. Choy categorically stated that if I were to assist him personally by redrafting the agreement between Dato' Peh and UOL Credit Sdn Bhd there and then, it would remain totally confidential and off the record. He appreciated that I would be at risk to disciplinary proceedings as well as it would not be proper and extremely embarrassing for me to appear to find the work of M/s Skrine & Co. or any other lawyer for that matter inadequate. He re-assured me that nobody would even know about my involvement in helping him redraft Dato' Peh's settlement and it would remain strictly confidential and off the record.

[34] The above evidence reveals two reasons as to why the plaintiff wanted the information to be kept confidential by the defendant. Firstly, according to the plaintiff, by rewriting the draft agreement between Dato' Peh and UOL, he ran the risk of disciplinary proceedings by the Bar Council. Secondly, 'it would not be proper' and 'extremely embarrassing' for him to find the work of Messrs Skrine & Co 'inadequate'.

[35] But in cross-examination the plaintiff gave a third reason as to why he wanted the information to be kept confidential. This is what he said:

Q: You did not want to be dragged back into Court if Dato' Peh defaulted in his installment repayments?

A: I did not want to be dragged back into Court.

Q: Therefore, you had to make sure that everyone understood that you were separate from Dato' Peh?

A: Yes.

Q: That is why you repeatedly said you wanted your 'settlement' to be separate from Dato' Peh's?

A: I repeatedly said that my settlement had nothing to do with Dato' Peh.

Q: You wanted to be kept out from any further proceedings that might arise upon default by Dato' Peh?

A: Yes.

Q: And that is why you wanted to prevent Mr. Choy from disclosing your role in the drafting of the compromise agreement?

A: That would be one of the reasons.

[36] From the above evidence it would appear that the third reason is that the plaintiff did not want his settlement with UOL to be linked to Dato' Peh's settlement with the UOL. In other words, the plaintiff wanted his settlement (with UOL) and Dato' Peh's settlement (with UOL) to be considered as two separate (or unconnected) matters altogether.

[37] Now, on the hypothesis that, notwithstanding that the reasons are not pleaded, the plaintiff is, nevertheless, entitled to rely on the reasons as given by him in his evidence, the question then arises: are the reasons acceptable to the court? On the first reason, the plaintiff has not explained which particular rule of etiquette that he has breached. But even if he has indeed breached a rule of professional etiquette as an advocate and solicitor, surely he is not entitled to the protection of the Court. In the House of Lords case of *A-G v Guardian Newspapers (No 2)(HL(E))* [1990] 1 AC 109 Lord Griffiths said (at p 268):

> The courts have, however, always refused to uphold the right to confidence when to do so would be to cover up wrongdoing. In *Gartside v Outram* (1857) 26 LJ Ch 113, it was said that there could be no confidence in iniquity.

[38] It is elementary that a person is not entitled to benefit from his own wrongdoing.

[39] I find the plaintiff's second reason as being unclear as well as unconvincing. Clearly this is not a case where the plaintiff found the Skrine's draft being 'inadequate' or wanting purely as a matter of drafting skill. The plaintiff was not correcting a draft which he found or which he thought to be a product of slipshod or shoddy drafting. As I see it, it is more of a case of the plaintiff finding the Skrine's draft not being in consonance with his interest — and he wanted it to be rectified.

[40] As for the third reason given by the plaintiff, I find it difficult to understand the logic of his reasoning. In what way would the plaintiff's desire to have his settlement be regarded as a different matter from Dato' Peh's settlement be undermined if the defendant were to let it be known to the world at large that the handwritten draft and the amendments to the Skrine draft were authored by the plaintiff?

[41] To sum up it is my finding that the reasons given by the plaintiff for wanting the information to be kept confidential are lacking in merit and hence are unacceptable.

[42] In conclusion, I hold that, firstly, the statement of claim is fatally defective in that it omits certain essential particulars (which cannot be rectified through the adducing of evidence), namely:

(a) particulars pertaining to the necessity to maintain confidentiality over the information;

(b) particulars pertaining to the relationship of the parties; and

(c) particulars pertaining to the necessity on the part of the plaintiff to amend the Skrine's draft and to produce his own draft.

[43] Secondly, in any case, putting side the issue of pleading for the moment, and considering just the evidence, the information in question does not have the necessary quality of confidence about it. The plaintiff has maintained that he gave the information to the defendant as a friend of the defendant, and not as a customer of UOL giving the information to the defendant as an officer of UOL; hence going by the plaintiff's own evidence, the transaction is personal in nature. But looking at the transaction and the disclosure, there is no invasion of privacy involved. Where the transaction is personal in nature, the court will only grant protection or remedy where there

A is an invasion of privacy. Moreover, the plaintiff has failed to convince the court that he has a good or acceptable reason for wanting the information to be kept confidential.

Plaintiff's claim dismissed with costs.

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Reported by Kanesh Sundrum

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